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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1347

STANLEY-ARTEX WINDOWS, DIVISION OF THE STANLEY WORKS, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2-10) is reported at 401 F. 2d 434. The Board's Decision and Order (Pet. App. 11-28) are reported at 166 NLRB No. 110.

JURISDICTION

The judgment of the court of appeals (Pet. App. 67-69) was entered on November 21, 1968, and a petition

for rehearing was denied on January 2, 1969 (Pet. App. 71-72). On March 7, 1969, the Chief Justice extended the time for filing a petition for a writ of certiorari until May 2, 1969 (Pet. App. 77), and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1)).

QUESTIONS PRESENTED

1. Whether the National Labor Relations Board properly found that the employer failed to bargain in good faith when it refused the union's request for financial data to support its claim of inability to meet the union's economic demands.

2. Whether substantial evidence supports the Board's finding that the employer's layoff of reinstated unfair-labor-practice strikers was necessitated, not by a decline in business, but by its earlier failure to discharge replacements hired during the strike.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*, are set forth at Pet. App. 79-80.

STATEMENT

A. The Board's Findings of Fact

Petitioner is a Florida manufacturing firm whose employees are represented for collective bargaining purposes by the United Steelworkers of America, AFL-CIO, Local 5571. On October 19, 1964, William McCall, the union's chief negotiator, met with Plant

Manager Robert Burger to negotiate a collective agreement; the existing one was due to expire January 30, 1965 (Pet. App. 33). The Union raised such economic issues as severance pay, cost of living increases, bereavement pay, jury duty pay, and overtime for Saturday work (Pet. App. 14). On November 23, before the second bargaining session, General Manager Farley wrote a letter to all employees, in which he noted the Company's financial position in 1964 had fallen below its hopes. In pertinent part, the letter stated (Pet. App. 14):

> However, increased sales do not necessarily mean increased profits or earnings. Earnings are what is left after expenses are paid. Unfortunately, our cost of doing business has increased alarmingly, resulting in earnings not in proportion to our sales increases.
>
> Material costs have increased and we have also spent large sums in improving our working conditions by bringing the property and equipment to a better appearance and operating condition.

Subsequently, at the second bargaining session, the Union renewed its previous proposal, and submitted other economic demands—an increase in hospitalization benefits, and higher wage rates for employees who had accumulated 2 days' experience in certain jobs. At the same time, the Union requested certain Company financial data. (Pet. App. 14-15; R. 41-42).[1] Two days later, McCall, the Union agent, wrote to the Company and, referring to the Company's

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[1] "R" references are to the joint appendix in the court below.

claims in its November 23 letter about its financial position, again requested certain financial information to enable the Union "to make a realistic approach to the joint problem".[2] The Company supplied the consolidated financial reports of its parent company, but did not furnish any financial information concerning its own operations. When the Union again requested such data, the Company stated that "it was not available and not the company's [The Stanley Works] policy to make it available" (Pet. App. 15).

Another negotiating session was held January 19, 1965. The Company's proposals included a two percent wage increase effective in 1966 (Pet. App. 37-38; R. 48-49). When McCall protested that the wage offer was inadequate, Burger, the Company negotiator, responded that "the Company as a whole is making money but we are not making money in this division, that we have to stand on our own down here and if we can't make it here, one of these days they will be closing the doors, because we have been losing money long enough." McCall then requested that Burger justify his position with the financial infor-

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[2] Specifically McCall requested (R. 111):

1. Financial statement for the past five years, including 1964.
2. Cost of the pension plan at your plant.
3. The number of persons receiving benefits and the amount of benefits paid former employees covered by the pension plan at your plant.
4. The cost of the insurance plan now in effect, and additional cost of any proposed plan.
5. A complete copy of the Job Evaluation Plan now in effect, including all material pertinent to the plan.

mation the Union had sought previously, but Burger again stated that it was not Company policy to make such information available to any union (Pet. App. 15; R. 49-50).

On January 26, the Company wrote another letter to its employees in which it explained its proposal to the Union. The letter stated, in pertinent part (Pet. App. 15-16):

> To give you a little background, you will recall in previous letters I had mentioned to you that 1964 had been a very trying and difficult year. Even though our sales were higher, our earnings were considerably less than the year before.
>
> I think you have a right to know how your company can do more business and yet realize less profit. The reasons are not simple ones. One is the fact that we had a rash of price increases during the past twelve months. Our aluminum costs went up three different times and our glass cost was increased 15%.
>
> An even more important reason is to meet customer requirements for our new business, we had to increase the number of employees and work many hours overtime, which is very costly. The overtime has been reflected in each of your paychecks.
>
> The increased costs did not end with overtime and new trainees because all the contributing areas of cost in the plant went up accordingly with the increase of employment hours.

When the Union presented its wage proposal [3] at the next meeting, Burger responded that the Company could not "remain competitive" if it paid more than it had offered (Pet. App. 16-17; R. 73, 83). McCall again asked for the financial data that might support this position, and Burger again stated that the parent company would furnish no additional information (Pet. App. 17). At another meeting held the following day, Burger offered to convert the Company's proposal of a two percent increase into a four cents per hour increase. McCall replied that this represented no appreciable change in the Company's earlier proposal, and informed Burger that "inasmuch as this looks like we are not in agreement nor are we going to be in agreement, that probably these people would go out on strike" (Pet. App. 40-41).[4]

On January 30, the employees met and voted to reject the Company's proposals. In addition to the contract proposals, McCall discussed the Union's request for financial data and the Company's refusal to furnish it. A strike began the next day (Pet. App. 19-20, 41-42).

The Company permanently replaced all the strikers on or about February 14, 1965 (Pet. App. 17). On March 30, McCall made an unconditional offer to the

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[3] The Union proposed a 10-cent increase immediately and another to be added in 1966, on the basis of an 18-month contract (Pet. App. 40).

[4] Subsequently the parties met with the Federal Mediation and Conciliation Service. At the first two meetings with the Service, the Company repeated its position that it was unable to offer "more than we were offering" (Pet. App. 17, n. 2).

Company on behalf of the strikers to return to their former or equivalent positions. The Company replied that it was willing to reinstate all strikers with the exception of a number whom it claimed had engaged in violence and misconduct during the strike.[5] A few days after McCall's request for reinstatement, the Company reemployed approximately 105 strikers (Pet. App. 52).

With the return of the strikers, the Company's work force totalled approximately 350 employees. At the end of April, Burger was informed by the parent company that such an enlarged work complement was not economically feasible, and that a layoff was required. Burger instructed his foremen to release approximately 42 employees on May 1, 1965. When the layoff was effected, approximately 17 former strikers were released (Pet. App. 53). Over 100 striker replacements were retained at that time (Pet. App. 20 n. 9).

B. The Decisions Below

The Board found that "[a] scrutiny of the * * * evidence, and the record as a whole, convinces us [that the Company] took the position * * * that it could not afford substantial increases in wages and other benefits, and by the January 27 or 28 meeting, and thereafter, its position had crystallized into a claim of inability to pay more than it was offering and remain competitive" (Pet. App. 17). It considered the Company's "claimed * * * inability to pay more than it

[5] At the Board hearing the Company abandoned these allegations of strike misconduct (Pet. App. 20, n. 7).

was offering and remain competitive" to be, "in effect, a plea of inability to pay" (Pet. App. 19, n. 5). It thus concluded, following *National Labor Relations Board* v. *Truitt Mfg. Co.*, 351 U.S. 149, that the Company had failed to bargain in good faith, and violated Section 8(a)(5) of the Act, when it refused to supply financial data relevant to its assertion of inability to meet the Union's economic demands (Pet. App. 19).[6]

The Board further found that "the stalemate in negotiations to which [the Company's] refusal to furnish information contributed resulted in the strike of January 31, 1965, and that this strike must therefore be found to have been caused and prolonged by [the Company's] unfair labor practices" (Pet. App. 19). Finally, the Board found that the layoffs of the striking employees were attributable, not to a loss of business, but to the Company's "own failure to discharge strike replacements as the strikers returned to work"; therefore, such layoffs violated Section 8(a)(3) and (1) of the Act (Pet. App. 20 and n. 9).

The Board ordered the Company to furnish the Union, upon request, with information relating to the Company's claim of inability to pay the wage increases and other benefits requested by the Union; to offer all the strikers full and immediate reinstatement; to make them whole for any loss of pay and benefits resulting from the Company's refusal or delay in of-

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[6] The Board also noted that the information which the Company refused to divulge to the Union "it chose instead to divulge only to its employees in an argumentative fashion without documentation" (Pet. App. 19, n. 6).

fering them reinstatement or from its subsequent lay-off action; and to post the customary notices (Pet. App. 23-25).

The court of appeals sustained the Board's findings and enforced its order (Pet. App. 5).

ARGUMENT

1. Petitioner's principal contention is that this Court's decision in *National Labor Relations Board* v. *Truitt Mfg. Co.*, 351 U.S. 149, requires the Board to decide the good-faith-bargaining issue on the basis of an employer's overall, subjective good faith, so that it may not rely on a single flaw, such as refusal to furnish information, to support an unfair labor practice finding. The argument misconstrues this Court's holding in that case, in an effort to create a legal issue out of what basically involves only questions of fact and application of well settled rules. This Court held in *Truitt* that "Good-faith bargaining necessarily requires that claims made by either bargainer should be honest claims. This is true about an asserted inability to pay an increase in wages. If such an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy." *Id.* at 152-153. While the Court refused to hold that employees were always entitled to substantiating evidence when economic difficulties are raised as an argument against wage increases, stating that "[t]he inquiry must always be whether or not under the circumstances of the particular case the statutory obligation to bargain in good faith has been met," *id.* at 153-154, neither the

opinion, nor any of the cases petitioner cites in support of its allegations of conflict (Pet. 12), suggest that a finding of bad faith flowing from a refusal to supply requested information would be insufficient. Indeed, *Truitt* involved no finding of overall bad faith; the Court's reference to "particular facts" must be read in the light of its antecedent comment that an employer's failure to furnish information might not support an inference of bad faith where a showing was made that production "might be unduly burdensome or injurious to its business." 351 U.S. at 151. And the cases petitioner cites show a consistent willingness of the courts of appeals to enforce unfair labor practice findings based on a refusal to supply needed information.

The Board properly applied the *Truitt* principle in the present case. Petitioner did not claim or show that production of the information requested would be unduly burdensome or prejudicial. The Board considered the refusal to produce information in light of all the facts of the case—including the Company's willingness to rely on the claim of financial difficulty in explaining its position to its employees at the same time as it was refusing the Union the information that might substantiate that claim and thus advance the pending negotiations. In the light of those facts, it reasonably concluded that the Company had claimed an inability to meet the Union's economic demands without producing the proof of accuracy that "[g]ood-faith bargaining necessarily requires," 351 U.S. at 152, and thus had violated Section 8(a)(5). No *per se* rule was applied, and no case remotely suggests that

such facts would not support the unfair labor practice finding made.

2. The second question posed in the petition—whether an employer, having reinstated unfair labor practice strikers "under business conditions requiring a work force including all strikers, non-strikers and strike replacements," is required to lay off strike replacements before returning strikers in a subsequent layoff—is not presented on this record. For the Board and the court below found that the layoff was necessitated, not by a subsequent decline in business, but by the fact that the work force was abnormally enlarged due to the Company's failure to discharge strike replacements when it reinstated the returning unfair labor practice strikers.[7] Whether there is substantial evidence to support this finding is an issue which turns on particular facts and does not warrant review by this Court. In any event, as the court below stated: "The Company here offered no evidence to support its assertion that the layoffs were due to decline in business. Instead, testimony of Company officials show that the reinstatment on top of retained replacements caused the Company's labor force to exceed what it would normally be at that time" (Pet. App. 8).[8]

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[7] Employees who strike in protest over unfair labor practices, as the Board found was the case here, are entitled to reinstatement even though this may require the discharge of replacements. See *Mastro Plastics Corp.* v. *National Labor Relations Board*, 350 U.S. 270, 278.

[8] Plant Manager Burger testified (R. 77):

> Well, we had all these people that replaced the strikers and * * * I received a letter and a phone call from Mr. McCall stating that he wished to return all the strikers

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1969.

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unconditionally * * * and we took back * * * around 100 or 105 of them and that meant our work force was increased by 100 or 105 people more than what it normally would be at that time. And after going through the expenses and everything, people from New Britain came down and said that it would be a good idea to have a layoff and so we laid off some of these people.

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